



Directive on the Mandatory Disclosure of Potentially Aggressive Tax Planning Arrangements

5th Amendment to the DAC



The New Initiative

- **Policy objective**
 - ❖ To increase the effectiveness of tax authorities in tackling cross-border tax avoidance and evasion in the internal market
- **How?**
 - ❖ By reporting potentially aggressive tax planning schemes to the tax authorities &
 - ❖ **Sharing** information with all Member States
 - ❖ Expected outcome: deterrent effect
- This proposal **amends the DAC**



International Context

- **OECD**
 - ❖ BEPS Action 12 (2015)
 - Compilation of features of national regimes worldwide
 - No minimum standards
 - No best practice recommendations
 - ❖ Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures (2018)
- **3 national regimes:** IE, PT, UK.



Main Concepts

- **Cross-border Arrangements** that include at least one indicator – '**Hallmark**' – are **reportable**
 - ❖ **Only cross-border arrangements** are reportable:
 - Two or more Member States; or
 - One Member State and a third country
 - ❖ An arrangement includes a **series** of arrangements & comprises **steps or parts**.
 - ❖ **Marketable & Bespoke** Arrangements



Main Concepts

- The **hallmarks** determine what arrangements are reportable
 - ❖ There is **no presumption of tax avoidance**
 - ❖ The **authorities may investigate** whether there is an illegitimate tax practice based on the information
- **No action** by the authorities does **not imply acceptance of validity or the tax treatment**
- Taxes covered coincide with the scope of the DAC



Personal Scope – Who is liable to report?

- Primary reporting obligation lies with the **Intermediary**.
Who is an Intermediary?
- Conditions for qualifying as an Intermediary
- The reporting obligation is shifted to the **Relevant Taxpayer** if:
 - ❖ **No intermediary** (in-house schemes)
 - ❖ **Waiver** (legal professional privilege)
 - ❖ **Outside the EU**



Personal Scope – Who is liable to report?

- What happens where there is **more than one Intermediary**?
- **Joint and several liability** – all intermediaries involved in the same reportable cross-border arrangement
- **unless evidence** that the same information has been filed by another intermediary



Personal Scope – Who is liable to report?

- **Waiver** due to Legal Professional Privilege
- **Obligation to notify** any other intermediary or, if there is no such intermediary, the Relevant taxpayer of their disclosure obligations
- Professional secrecy rules remain national



Personal Scope – Who is liable to report?

- What happens where there is **more than one Relevant Taxpayer?**
- Information to be filed by the Relevant Taxpayer that **agreed the arrangement with the Intermediary;**
- Or if there is no such Taxpayer, the Relevant Taxpayer that **manages the implementation of the arrangement.**
- Each Relevant Taxpayer shall report annually that it keeps using a certain arrangement.



Timing – When is the reporting due?

- **Intermediaries & Taxpayers:** within **30 days** beginning:
 - ❖ On the day after the reportable arrangement is made **available for implementation**; or
 - ❖ On the day after the reportable arrangement is **ready for implementation**; or
 - ❖ When the **first step in implementing** the arrangement has been made.
- For **marketable** arrangements, **periodic** reporting every 3 months – clients' list update



Where is the reporting due?

- **Intermediaries** shall file information with the **competent authorities of the Member State** that features first:
 - ❖ Their tax residence;
 - ❖ There is a PE linked to the arrangement;
 - ❖ Incorporated or governed by the laws of;
 - ❖ Registered with a professional association.



Where is the reporting due?

- **Relevant taxpayers** shall file information with the **competent authorities of the Member State** that features first:
 - ❖ Their tax residence;
 - ❖ There is a PE that benefits from the arrangement;
 - ❖ They receive income or generate profits in a Member State although they are not tax resident or have a PE in any Member State;
 - ❖ They carry on an activity in one or more Member State although they are not tax resident or have a PE in any Member State.



Exchange of Information

- The disclosed information is exchanged **automatically**
- Exchanges take place **within one month after each quarter** of the year in which information was filed
- It is made **available to all Member States** on a Central Directory set up by the Commission
- The **Commission** has **limited access** to this information in order to monitor the functioning of the Directive



Penalties

- Design is left to Member States – national law
- Penalties shall be **effective, proportionate & dissuasive**



Hallmarks (i)

- Generic hallmarks & some of the specific ones require an additional "**main benefit**" test;
- A **tax advantage** is the **main benefit or one of** the main benefits which, having regard to **all relevant facts and circumstances**, a person **may reasonably expect to derive** from an arrangement.

Hallmarks (ii)

- **Generic hallmarks + "main benefit" test**
 - ❖ **Premium or contingency fee** fixed by reference to the amount of the tax advantage (incl. refunds)
 - ❖ **Marketable** arrangements: substantially standardised documentation and/or structure which are available to more than one relevant taxpayer without a need to be customised.

Hallmarks (iii)

- **Hallmarks B.1 – B.3 + "main benefit" test**
 - ❖ Use of (cross-border) **losses** to obtain a tax advantage
 - ❖ **Round-tripping of funds**
 - ❖ **Converting** income into other categories of revenue taxed at lower level



Hallmarks (iv)

- **Hallmark C.1(b)(i)&(ii) + "main benefit" test**
 - ❖ Cross-border payments
 - ❖ between associated enterprises
 - ❖ Source: deductible
 - ❖ Recipient's tax residence:
 - (i) No corporate tax or corporate tax at zero rate or almost zero rate; or**
 - (ii) On a list of non-cooperative jurisdictions**



Hallmarks (v)

- **Hallmarks C.1(c)&(d) + "main benefit" test**
 - ❖ Cross-border payments
 - ❖ between associated enterprises
 - ❖ Source: deductible
 - ❖ Recipient's tax residence: **(c) full tax exemption & (d) preferential tax regime**

Hallmarks (vi)

- **Hallmarks C.2 – C.4**
 - ❖ **Same depreciation** claimed on a specific asset in more than one jurisdiction
 - ❖ Cross-border **transfers of assets** & there is a **material difference** in the amount treated as payable in consideration for the assets in the jurisdictions involved

Hallmarks (vii)

- **Hallmark D.1 & D.2 – AEOI & Beneficial Ownership**
 - ❖ Arrangements that **may have the effect of undermining** the reporting obligation
 - under DAC 2 or
 - any equivalent international agreements, incl. with 3rd countries or
 - By taking advantage of the absence of legislation or agreements



Hallmarks (viii)

- **Hallmarks E.1 – E.3 – Transfer Pricing**
 - ❖ Unilateral **safe harbour rules**
 - ❖ **Hard-to-value-intangibles**
 - ❖ **Business re-organisations** leading to BEPS (impact on the projected EBIT)



Information to the Commission

- Information for evaluating effectiveness in **combating tax avoidance and evasion** (Art. 23(2))
- Yearly assessment re **AEoI** (Art. 23(3)): effectiveness and results achieved
- **Statistical data** for evaluation of the Directive (Art. 23(4))



Retroactivity

- Unlike DAC 3, there is **no retroactive effect**

However:

- The reporting obligation includes arrangements the first step of which was implemented **after** the Directive **enters into force**.
- Information to be reported **by 31st August 2020**.
- Existing arrangements become reportable if they are modified subsequently



Important Dates

- **By 31st December 2019:** national transposition measures
- **From 1st July 2020:** application
- **By 31st October 2020:** first (regular) AEOI
- **Every 5 years after 1st January 2013:** Commission report
- **Every 2 years after 1st July 2020:** evaluation of the relevance of the Hallmarks – Commission report – (possibly) legislative proposal.
- Implementing Acts: Standard forms **before 30th June 2019;**
Central Directory **by 31st Dec. 2019**